

examining the debate during Congress's consideration of the Act. During the debate, Senator Leahy stated, "Filing a claim [with the Victim Compensation Fund] . . . would preclude other civil remedies."¹¹ His comment was echoed in the House by Congressman Conyers: "[A Victim Compensation Fund] claimant waives the right to file . . . a civil action for damages[.]"¹² Conyers later explained that the Act "provided for a two-track liability system. . . . The second track is available to persons who elect not to pursue the [Victim Compensation Fund]."¹³

Thus, the legislative history confirms the plain meaning of the statute: by filing a claim with the Victim Compensation Fund, individuals voluntarily give up any

¹¹ 147 Cong. Rec.S.9599 (daily ed. Sept. 21, 2001).

¹² 147 Cong. Rec.H. 5914 (daily ed. Sept. 21, 2001).

¹³ 147 Cong.Rec.H. 7644 (daily ed. Nov. 1, 2001).

right to pursue a lawsuit related to the September 11 attacks.

B. There Is No Conflict among the Second Circuit Opinions Interpreting the Act.

In an effort to provide a reason for this Court to grant their petition, Plaintiffs argue that the Second Circuit opinions in *Canada Life*¹⁴ and *In re WTC Disaster Site*,¹⁵ conflict with the Second Circuit opinion in this case. Plaintiffs are mistaken because the *Canada Life* and *WTC Disaster* opinions construe §408(b) of the Act, a section completely different from §405, which the Second Circuit construed in this case.

In *Canada Life*, the Second Circuit ruled that §408's grant of jurisdiction "for damages arising out of the hijacking and subsequent crashes" of the airliners on

¹⁴ 335 F.3d 52 (2d Cir. 2003).

¹⁵ 414 F.3d 352 (2d Cir. 2005).

September 11 did not extend to “actions involving economic losses that would not have been suffered ‘but for’ the events of September 11 but otherwise involve no claim or defense raising an issue of law or fact involving those events.”¹⁶ In *In re WTC Disaster Site*, the Second Circuit held that §408 applied to “claims of respiratory injuries by workers in sifting, removing, transporting, or disposing” of the debris created by the collapse of the World Trade Center.¹⁷ Because those two opinions do not deal with §405’s waiver provision, they do not conflict with the opinion below.

Plaintiffs argue that the decision below can be harmonized with *Canada Life* and *In re WTC Site* only by restricting §405’s waiver to “only damages alleged to have resulted exclusively from acts and omissions incident to the

¹⁶ *Canada Life*, 335 F.3d at 59.

¹⁷ *In re WTC Disaster Site*, 414 F.3d at 377.

'terrorist-related aircraft crashes' themselves"¹⁸ The waiver would not include, according to Plaintiffs, "all claims of which the terrorist attacks were a cause in fact."¹⁹ So, as Plaintiffs would have it, they can collect compensation from the Victim Compensation Fund for claims they might have had against the airlines and, even though they agreed to waive, in the words of §405, "the right to file a civil action . . . for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001,"²⁰ they can still file a lawsuit against Motorola and New York City for the deaths of firefighters.

The Plaintiffs' argument was considered and rejected by the Second Circuit. The court stated that the Plaintiffs "cannot embrace the statute's broad view that

¹⁸ Petition, p. 16 (quoting the Act).

¹⁹ *Id.*

²⁰ Section 405(c)(3)(B)(i).

many people, in widely differing circumstances, died 'as a result' of the attacks while simultaneously constricting the same language in the waiver to include only the airlines."²¹

The argument depends on a tortuously narrow reading of the statute that is contradicted by the language of the statute itself. There is nothing in the Second Circuit's discussions of the jurisdictional provision of §408 that could be interpreted to alter the plain language of §405, which is unmistakably intended to compel victims to choose between filing a claim with the Victim Compensation Fund and filing a lawsuit.

Plaintiffs' argument simply ignores that Congress itself stated that the purpose of the Act is "to provide compensation to any individual . . . who was physically injured or killed as a result of the terrorist-related aircraft

²¹ *Virgilio*, 407 F.3d at 114.

crashes of September 11, 2001.”²² Once a party has filed a claim with the Victim Compensation Fund, Congress did not intend to allow the party to burden the judiciary with additional claims that arose out of the terrorist attacks.

The decisions in *Canada Life* and *In re WTC Site* interpret the jurisdictional grant provision of §408(b) of the Act. They do not, and could not, conflict with the Second Circuit’s interpretation of the wholly separate §405 waiver provision in this case. Indeed, the Second Circuit opinions that mention the waiver provision have all been consistent with one another and with the holding that the Act compels victims to choose between filing a claim with the Special Master and pursuing the riskier course of litigation. For example, in *Canada Life*, the Second Circuit noted that the Victim Compensation Fund “provides . . . compensation in exchange for a waiver of rights to file a civil action for

²² Section 403.

damages resulting from . . . September 11.”²³ And in *Schneider v. Feinberg*,²⁴ the court said “eligibility for compensation from the [Victim Compensation Fund] is conditioned upon waiver by claimants ‘of the right to file any civil action[.]’” (internal citations omitted).

Two opinions from district courts in the Southern District of New York also conform to the Second Circuit position that the Act provides claimants with the alternative of filing a claim or filing a lawsuit. In *Combined Ins. Co. of America v. Certain Underwriters at Lloyds*,²⁵ the court wrote, “Section 408(b)(3) . . . intended to provide eligible individuals . . . with the alternative of litigation rather than participating in the [Victim Compensation Fund].” That sentiment is echoed in *Int’l Fine Art and Antique Dealer*

²³ 335 F.3d at 55.

²⁴ 345 F.3d 135, 139 (2d Cir. 2003).

²⁵ 2002 U.S. Dist. LEXIS 17303 at *2 (S.D.N.Y. 2002).

Show, Ltd.,²⁶ in which the court wrote, "Congress intended there to be two avenues for [9/11] victims . . . Eligible individuals may either elect to file a claim . . . , or pursue a claim for damages"

The Act's language is clear. One who files a claim with the Victim Compensation Fund "waives the right to file a civil action . . . for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001."²⁷ That includes the Plaintiffs' claim against Motorola and New York City for allegedly being part of the cause of their decedents' deaths in the collapse of the World Trade Center. The Second Circuit's opinions relating to the Act are consistent. There is no reason for this Court to review them.

²⁶ 2002 U.S. Dist. LEXIS 10878 at *14 (S.D.N.Y. 2002).

²⁷ §405(c)(3)(B)(i).

C. Punitive Damages Cannot Be Pursued in New York in the Absence of a Claim for Compensatory Damages.

If there were any doubt as to whether Plaintiffs should be able to pursue a suit for punitive damages after they submitted their claims to the Victim Compensation Fund, it would be put to rest by New York law. Section 408(b)(2) of the Act states that the substantive law of New York applies to any suit filed concerning the collapse of the World Trade Center. New York law is clear that a claim for punitive damages cannot be made in the absence of a claim for compensatory damages. As New York's highest court has stated: "A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud . . ."²⁸ Since Plaintiffs cannot file a suit for compensatory damages, the Second Circuit correctly held they are

²⁸ *Rocanova v. Equitable Life Assurance*, 634 N.E.2d 940, 945, 83 N.Y.2d 603, 616 (1994).

prohibited from pursuing one solely for punitive damages. The Second Circuit's application of settled New York law does not warrant review by this Court.

D. New York Law Prohibits Assessing Punitive Damages Against New York City.

Even if the statute were not clear that Congress compelled Plaintiffs to choose between filing a claim with the Victim Compensation Fund and filing a lawsuit, and even if New York law allowed a punitive damage claim to be made in the absence of a claim for compensatory damages, the Second Circuit properly dismissed Plaintiffs' suit against New York City because New York law does not permit punitive damages to be assessed against a governmental entity.

The New York Court of Appeals addressed this question in *Sharapata v. Town of Islip*.²⁹ The court noted

²⁹ 437 N.E. 2d 1104, 452 N.Y.S.2d 347 (1982).

that while compensatory damages are supposed to make a victim whole, punitive damages are intended to "punish the tort-feasor for his conduct and to deter him and others like him from similar action in the future."³⁰ That approach cannot work where the defendant is a government because imposing punitive damages punishes taxpayers. Following this Court's opinion in *Newport v. Fact Concerts*,³¹ New York's highest court held that punitive damages cannot be assessed against a governmental entity.

Conclusion

The Second Circuit's holding is correct and there is no need for this Court to review it. This case presents a straight-forward issue of statutory construction that does not warrant this Court's attention. The Act is clear on its

³⁰ 437 N.E.2d at 1105, 452 N.Y.S.2d at 348.

³¹ 453 U.S. 247 (1981).

face. One who files a claim with the Victim Compensation Fund waives the right to file a claim for damages arising out of the September 11 attack. Plaintiffs, representatives of firefighters who died in the World Trade Center, filed claims with the Fund. They are therefore prohibited from pursuing any claims they may have against Motorola and New York City. A claim limited to punitive damages would also be inconsistent with New York law, which prohibits claims for punitive damages in the absence of a claim for compensatory damages. Such a claim would also violate New York law if it were permitted to continue against New

York City because punitive damages cannot be assessed against a governmental entity under New York law.

For all these reasons, the City of New York respectfully requests this Court to deny the Petition for Certiorari.

Dated: New York, New York
December 15, 2005

Respectfully submitted,

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U.S. SUPREME COURT

IN THE
Supreme Court of the United States

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GERALDINE HALDERMAN, Personal Representative of Lt. David
Halderman; EILEEN TALLON, Personal Representative of Sean Patrick
Tallon; GERARD J. PRIOR, Personal Representative of Kevin M. Prior;
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Representative of Thomas P. DeAngelis,

Petitioners,

—against—

CITY OF NEW YORK and MOTOROLA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**RESPONDENT MOTOROLA, INC.'S OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals correctly held that under Section 405(C)(3)(B)(i) of the Air Transportation Safety and System Stabilization Act (the "ATSSSA") Plaintiffs waived their right to pursue a civil action against Motorola for damages sustained as a result of the September 11th attacks because Plaintiffs elected to seek compensation from the September 11th Victim Compensation Fund, and whether that holding conflicts with Second Circuit precedent.

2. Whether the court of appeals correctly held that the waiver of litigation provision in Section 405(C)(3)(B)(i) of the ATSSSA applies to all actions, including those seeking punitive damages.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Motorola, Inc. discloses that it has no parent corporation and that no publicly-held company owns more than 10% or more of its stock.

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Defendant Motorola, Inc. ("Motorola") respectfully submits this opposition to the petition of Petitioners Lucy Virgilio, *et al.* ("Plaintiffs") seeking a writ of *certiorari* to review the opinion of the United States Court of Appeals for the Second Circuit in *Virgilio, et al. v. City of New York and Motorola, Inc.*, 407 F.3d 105 (2005).

STATEMENT OF THE CASE

FACTS

On September 11, 2001, thousands of individuals—including those represented by Plaintiffs in this petition—were killed as the result of the largest terrorist attack on United States soil.

In the weeks following September 11th, the United States Congress responded with unprecedented speed. In just ten days, a nearly-unanimous Congress enacted the Air Transportation Safety and System Stabilization Act (the "ATSSSA"), 49 U.S.C. § 40101 note, Pub. L. No. 107-42, 115 Stat. 230 (2001). The ATSSSA is a comprehensive statutory scheme designed to effectuate several critical objectives in the immediate aftermath of the attack, including the provision of compensation to September 11th victims and their families.¹

The ATSSSA states expressly that one of its purposes is "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." ATSSSA § 403. The ATSSSA provided victims two separate and distinct

¹ One of the other critical objectives was, of course, to protect the safety and security of the airline industry and its financial solvency.

means for seeking a remedy for the injuries sustained on September 11. One remedy was to file for an award of benefits from the "September 11th Victim Compensation Fund of 2001" which was established in Section 405 of the ATSSSA (the "VCF"). The other was to pursue a federal cause of action in the Southern District of New York under Section 408 of the ATSSSA.

The ATSSSA required September 11 victims to make an election of remedies. They could either seek compensation from the VCF under Section 405 or pursue litigation under Section 408, but not both. Indeed, Section 405 specifically provides that persons who file claims for VCF compensation "waive the right to file a civil action in any federal or state court for damages sustained as a result of the September 11 terrorist attacks." As the court of appeals found, "The waiver provision [in Section 405] requires litigants to choose between risk-free compensation and civil litigation." 407 F.3d at 113.

VCF Compensation Under § 405

The purpose of VCF compensation under Section 405 was to provide victims with a simple and speedy alternative to litigation, which is often expensive, time-consuming and uncertain.² As the court of appeals put it, Congress created the VCF "to provide no-fault compensation to victims who were injured in the attacks and to personal representatives of victims killed in the attacks." *Id.* at 109. Section 405 established a simple process for submitting claims to the Special Master and provided for governmental funding of claims that are

² See, e.g., 147 Cong. Rec. H5894-02, H5913 (2001) (Statement of Rep. Delahunt) ("[The ATSSSA] will provide swift compensation to the victims and their families. They deserve everything we can do for them. The bill will give these families a way to obtain compensation without the expense, uncertainty, and pain of protracted litigation.").

approved. ATSSSA § 405. The statute requires only that claimants establish their eligibility to receive a VCF award, and the extent of "harm to the claimant, the facts of the claim, and the individual circumstances of the claimant." ATSSSA § 405(b)(1)(B)(ii). Both economic and non-economic losses are allowed. *See* ATSSSA § 405(b) and ATSSSA § 402(7), (9) (defining both types of losses broadly).

In addition, Section 405 contains provisions that allow claimants to receive compensation more quickly and easily than if they elected to file a lawsuit. *Id.* It does not require claimants to prove fault of any kind and, indeed, expressly forbids consideration of "negligence or any other theory of liability." ATSSSA § 405(b)(2). Nor does the statute require any showing of causation. The Special Master must "determine" a claim within 120 days and no trial or other formal proceeding is required. *See* ATSSSA § 405(b)(3). Section 405 does not require application of the rules of evidence or any other litigation procedure. Not surprisingly, secondary literature describes the VCF as a no-fault system of recovery that rejects ordinary liability and causation principles.³

³ E.g., Raymond L. Mariani, *The September 11th Victim Compensation Fund Of 2001 And The Protection Of The Airline Industry: A Bill For The American People*, 67 J. Air L. & Com. 141, 175 (2002) ("Congress could have, but did not, allow claimants to file suit against whomever they believe culpable, proceed to verdict before a jury and have the Government pay the judgment. That process would have created awards that would most closely resemble lawsuits against defendants. Instead, Congress created a more limited vehicle for recovery."); Robert L. Rabin, *Indeterminate Future Harm In The Context Of September 11*, 88 Va. L. Rev. 1831, 1836-37 (2002) (describing the VCF as a hybrid system reflecting "the love-hate relationship the American public has with its tort system," and its "inescapable lineage as a no-fault plan, not a mini-version of the tort system.").

Section 405(c)—entitled “Eligibility”—lists the specific requirements that a claimant must meet to qualify for VCF compensation. For example, claimants must have been “present at the World Trade Center . . . at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001.” ATSSSA § 405(c)(2)(A)(i). One of the other eligibility requirements, listed in Section 405(c)(3)(B)(i), is that a VCF claimant must “waive the right to file a civil action in any federal or state court for damages sustained as a result of the September 11 terrorist attacks.” Thus, as the Second Circuit found in an unrelated case, “eligibility for compensation from the Fund is conditioned upon a waiver by claimants of ‘the right to file any civil action’ in state or federal court . . .” *Schneider v. Feinberg*, 345 F.3d 135, 139 (2d Cir. 2003).

Litigation Under Section 408

For those September 11th victims who chose not to file for compensation with the VCF, Section 408 created an exclusive federal cause of action for “damages arising out of the hijacking and subsequent crashes” of the hijacked planes. ATSSSA § 408(b)(1). The ATSSSA vested the Southern District of New York with “original and exclusive jurisdiction over all actions brought for any claim . . . resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.” ATSSSA § 408(b)(3). Section 408 also specifically limited the liability of any air carrier “for all claims” to “the limit of liability coverage maintained by the air carrier.” ATSSSA § 408(a). Section 408 was later amended to also limit the liability of New York City (the “City”). Aviation and Transportation Security Act (the “TSA”), 49 U.S.C. § 40101 note, Pub. L. No. 107-71, 115 Stat. 597,